

8 Official Opinions of the Compliance Board 63 (2012)

- ◆ Exceptions Permitting Closed Sessions
 - ✧ Procurement, §10-508(a)(14) - within exception, discussion of: discussion of procurement matter after bid opening but pre-award, when adverse effect of disclosure found
 - ◆ Closed Session Procedures
 - ✧ General - need to meet the elements of the exception claimed
 - ◆ Closed Session Procedures
 - ✧ Written Statement - Advisory Function
 - omission of information on how each member voted on action taken in closed session
 - ◆ Closed Session Procedures
 - ✧ Written Statement - Advisory Function
 - omission of functions of each non-member attendee
 - ◆ Minutes
 - ✧ Generally: redaction generally not permitted
 - ◆ Public Body - determined not to be a public body
 - Proposal evaluation panel created by procurement staff
 - ◆ Compliance Board - Authority and Procedures
 - ✧ Jurisdictional limits
 - Open Meetings Act issues only
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May 4, 2012

Re: Maryland Transportation Authority (Craig O'Donnell, Complainant)

We have consolidated and considered three complaints of Craig O'Donnell (“Complainant”) that the Maryland Transportation Authority (the “Authority”) and two of its committees violated the Open Meetings Act (the “Act”) in various ways. Complainant particularly questions the closing of meetings to

the public for the discussion of proposals submitted to the Authority for various projects, including the redevelopment of the travel plazas on Route I-95, and the formation of a committee to evaluate those proposals.¹

Introduction

Since 2010, we have issued ten opinions in response to Complainant's many-faceted allegations of Open Meetings Act violations on the part of the Authority and its committees. In that time, the Authority has confirmed the status of its Finance and Capital Committees as public bodies subject to the Act, posted its own minutes and the minutes of those two committees on its website, provided more meaningful information on its closing statements, and provided copies of many minutes to Complainant.

Against this backdrop, we embark on this eleventh opinion. Complainant's primary concern here – the secrecy of the Authority's procurement process – demonstrates that these parties' difficulties stem in large part from the inherent conflict between, on the one hand, the media's interest in the important projects the Authority undertakes, and, on the other, the Authority's need to conduct its many procurements in accordance with the principles that limit the dissemination of procurement information. We conclude here that neither the Authority nor its committees violated the Act with respect to the use of an evaluation panel to review proposals for the travel plazas project.

We will set forth our conclusions on Complainant's other allegations in the discussion.

Discussion

A. The alleged secret committee to evaluate the travel plazas proposals

Complainant alleges "that the [Authority] created, through a process outside of its public open meetings, a secret committee to look over the [travel plaza] bids." Complainant asserts that such a committee was performing the public body's function and thus would be subject to the Act as an alter ego of

¹ Most of the information relevant to Complainant's allegations was either provided by Complainant through the documents he attached or available from the documents the Authority has posted on its website, and some allegations overlapped those asserted in complaints we had not yet addressed when these were filed. At our request, the Authority limited its response to our questions about the formation of a panel to review offers to participate in the travel plazas project.

the public body. Complainant further states that the public discussions by the Authority and committees on certain proposals are so brief as to suggest that the Authority's true deliberations occurred behind closed doors in undisclosed meetings.

The Authority's use of an evaluation committee in its procurement process was not secret. The Authority's request for proposals for the travel plazas states:

Responses to this RFP will be evaluated by a committee ("The Evaluation Committee"), which will be made up of individuals selected by MDTA. The Evaluation Committee will review all timely Proposals deemed to be conforming and responsive, and evaluate the written responses according to the evaluation criteria described below in Section 2.4.3. The Evaluation Committee may hold interviews and negotiations individually with Proposers, and may also request Best and Final Offers (BAFO), as it sees fit. It shall make a recommendation of selection to the MDTA Board for its action.

Counsel for the Authority has stated that the evaluation committee was formed and appointed by Authority staff and that its membership did not include a quorum of either the Authority or the Authority's committees. Furthermore, the committee's performance of its procurement advisory function and the alleged brevity of the Board's oral discussions did not make the committee an alter ego of the Authority's Board. The committee thus was not a public body and was not subject to the Act. *See 7 OMCB Opinions* 284, 285 (2011) (addressing subcommittee formed by agency employee). Agency procurement staff often assemble panels or committees to assist them in their evaluation of the responses to complex requests for proposals; that apparently occurred here.

B. The Authority meetings closed in order to discuss procurement matters

Complainant states that the Authority's "choice of proposal had been made before Jan[uary] 1, 2012." Therefore, he alleges, the Authority was not entitled to close subsequent discussions about the procurement under the provision of the Act that permits a public body to close a meeting to discuss

a procurement matter “before a contract is awarded.” State Government Article (“SG”) § 10-508(a)(14).²

An award is generally understood to occur when a procurement agency decides “to execute a ... contract after all necessary approvals have been obtained.” *See, e.g.*, COMAR 21.10.02.01(8). This contract required the approval of the Board of Public Works, which met on February 22, 2012. If, before the award, a discussion of the contents of the offerors' proposals would have adversely affected the Authority's ability to participate in the competitive proposal process, *see* SG § 10-508(a)(14), the Authority had the discretion to conduct that discussion in a closed session. That discretion lies with the Authority, which should have documented the possibility of an adverse impact on its closing statement so as to demonstrate that the members considered the question and establish the applicability of the exception.

C. The level of detail provided in the Authority's closing statements and closed-session minutes

Complainant alleges that the Authority's closing statements provided insufficient detail. For example, he states, the Authority cited SG § 10-508(a)(1) as one of the statutory bases for closing its December 22, 2012 meeting, but then did not describe the topics to be discussed in that category.³ The closing statement cites additional exceptions and identifies the topics of discussion, which are then summarized in the minutes of the Authority's open meeting. Complainant describes the citation to SG § 10-508(a)(1) as an “imperfection.” It appears to be nothing more than that. For every statutory exception checked, the presiding officer should provide the topic of discussion and reason for closing or state that no discussion was held on the topic. *See 7 OMCB Opinions 216 (2011).*

Complainant alleges that the Authority should have identified the functions of the non-members attending the Board's closed sessions. The Act does not so require; SG § 10-509(c)(2)(iv) requires only a “listing ... of the persons present” A public body may wish to supply such information, particularly when it would demonstrate the applicability of the claimed exception.

²For an explanation of the Act's provisions on the permissible closing of a meeting to the public, *see, e.g.*, 1 *OMCB Opinions* 221 (1997).

³For an explanation of the detail to be provided in the closing statement and summary of the closed session, *see, e.g.*, 6 *OMCB Opinions* 171, 173-74 (2009).

Complainant alleges that the references in the Authority's minutes to the members' public "ratification" of closed-session decisions mean that the Authority took actions in its closed session which it did not adequately disclose as "actions taken" in its summaries of these sessions. Specifically, Complainant asserts that the public has the right to know how each member voted in closed session on the matters then "ratified" in open session, and, further, to observe the deliberations. The matters in question were described as a collective bargaining agreement and bond issuance; both matters fell within the Act's exceptions to the open meeting requirement.

The Act does not necessarily entitle the public to observe a public body's vote on a matter properly falling within one of the exceptions listed in SG § 10-508. We observed in 5 *OMCB Opinions* 126, 128 (2007) that a motion made on a certain topic often occasions further debate which cannot be "divorced from the concerns that are identified in the exception and that led to the closed session." There, we concluded that a public body had not violated the Act by closing a session under the procurement exception and voting in that session on its selection. At other times, however, the vote can be divorced from the confidential matters. For example, when a public body receives legal advice on the legality of a certain legislative measure which itself does not fall within an exception, the public body must then discuss the underlying policy issues in a public session. See 7 *OMCB Opinions* 148, 152 (2011).

Here, the events ratified fell within exceptions. Even so, the Authority took a public vote on the topics it had addressed in the closed sessions. It then properly summarized those topics and the public votes in the minutes of its public meeting. The Authority's decision not to affix the label "actions" to the consensus or other form of agreement its members reached in closed session thus pertains more to corporate governance under the Authority's bylaws than to adequate disclosure under the Act.

D. The Authority's retitling of the minutes of its August 27, 2008 minutes

On August 27, 2008, a quorum of members of the Authority met, closed the session after a vote to do so, moved into open session, and adjourned. The minutes of that meeting are labeled as the minutes of the meeting of the Authority. On September 25, 2008, the Authority met and, among other things, approved the amendment of the minutes of the August 27 meetings to state that they were "'Capital Committee Meeting Notes' in lieu of 'Authority meeting.'" The minutes were not in fact amended; they still appear to be the minutes of an Authority meeting. Authority staff recently advised

Complainant that they were properly so labeled because a quorum of the Authority attended the meeting.

Complainant questions the Authority's change of name on the minutes and the fact that Authority staff (who apparently had been searching for Capital Committee minutes for Complainant) did not locate the minutes until he advised her that the Authority had met that day. In 2011, we concluded that the Capital Committee was a public body subject to the Act, and, in the same opinion, we stated the rule that committee meetings attended by a quorum of the members of the parent public body are meetings of that public body. 7 *OMCB Opinions* 176 (2011). So, staff correctly advised Complainant that the minutes were the minutes of a meeting of the Authority. Her e-mails, as excerpted, show also that she searched the Authority's records to locate the minutes. Of course, minutes ought to be properly labeled, and, in the final analysis, these were.

Complainant questions the method by which the members approved items on a "matrix." The minutes establish that the Authority members addressed the items by some means other than a meeting of a quorum. Complainant states correctly that we lack the authority to address the Authority's compliance with its bylaws.

E. The Authority's redaction of portions of its 2007- 08 Capital Committee minutes

As explained above, the Authority did not consider its Capital Committee to be a public body subject to the Act until 2011, when, after threading through the Authority's past resolutions, we concluded that it fell within the Act's definition of one. See 7 *OMCB Opinions* 176, 183 (2011). The Authority has since provided Complainant with the Capital Committee's minutes and an explanation that the Authority redacted the text summarizing its discussions with counsel and/or staff about pending litigation or with counsel to receive legal advice. Complainant states that the redactions are impermissible in light of our opinion at 7 *OMCB Opinions* 64 (2010). There we instructed the Authority as follows:

If a matter was discussed in an open session governed by [the Act] – even if the meeting could have been closed under [SG] § 10-508(a), but the public body did not elect to do so – the minutes of that meeting are available to the public. A privilege cannot be applied after the fact.

Id. at 67.

There, we assumed the redaction of the minutes of a publicly-held discussion which the public body later decided should have been closed. In such a case, a public body waives the privilege by “not elect[ing]” to assert it. In this case, incorrectly as it turned out, the Capital Committee did not intend to conduct its meetings in public, and it made no election to forego the confidentiality of its discussions. While the Capital Committee’s operation outside of the Act for the period preceding our opinion was hardly ideal, we will not declare that it thereby waived all of the privileges to which it was entitled. Put another way, the Committee’s noncompliance does not entitle Complainant to discover information to which he would not have been entitled.

We emphasize that our conclusion is limited to this case, which we address with the benefit of the history of the conduct of the Capital Committee as if it had been an informal entity beyond the reach of the Act.

F. The other allegations

We have considered the Complainant’s allegations on various other topics. We lack the authority to address his allegations about the Authority’s responses to his requests for the electronic transmission of documents. While the Act requires a public body to complete certain documents on the day of a meeting, the Act does not require staff to scan and transmit them by e-mail, much less than within two days. Under the Act, then, a person who seeks immediate access to closing statements should either attend the meeting or appear at the public body’s place of business soon thereafter.

We need not discuss at length Complainant’s allegations that the Authority did not adopt minutes from a May 2011 sufficiently promptly, because we set forth the applicable principles in 7 *OMCB Opinions* 264, 265-66 (2011) and again in 8 *OMCB Opinions* 32 (2012). In the 2012 opinion, we advised that when a public body finds it difficult to adopt minutes quickly, it should consider other means of approval.

We do not revisit the allegations we discussed in 8 *OMCB Opinions* 8 (2012).

Conclusion

In sum, the selection of a private partner for the travel plazas project fell within the procurement exception until the award of that contract. However, when the Authority closes a meeting to discuss an ongoing procurement

matter, it should indicate on its closing statement why confidentiality of the discussion is needed to assure the Authority's ability to participate in the competitive process, particularly when a member of public might think that the procurement has already been completed.

Open Meetings Compliance Board

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